IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 47

COLGATE-PALMOLIVE-PEET COMPANY, *Petitioner*,

v.

THE NATIONAL LABOR RELATIONS BOARD, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR PETITIONER.

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Preliminary Statement.

We will not attempt, because of the limited time available, to make a full and complete answer to the contentions of the Board. We will confine ourselves to showing that the Board has not been able to prove the truth of the major premise of the proposition for which it contends.

The Board's argument is based on the premise that the CIO's discharge demands were wrongful and illegal. On the basis of this premise, the Board argues that the Petitioner's compliance with these demands was equally wrongful and violates sections 7 and 8(3) of the National Labor Relations Act. (29 U.S.C.A. 157,158(3). It requires no elaboration to show that the wrongdoing of the Petitioner

is entirely dependent upon the wrongdoing, if any, of the CIO.

The Board attempts to prove that the conduct of the CIO was wrongful on the basis of the doctrines enunciated by this Court in the cases of *Steele* v. *Louisville & Nashville Railroad*, 323 U.S. 192, 89 L.Ed. 173, and *Wallace Corporation* v. *NLRB*, 323 U.S. 248, 89 L.Ed. 216. The doctrine of these cases requires that a statutory bargaining agent perform its duties in good faith and without discrimination.

The Board's theory regarding the alleged wrongdoing by the CIO is entirely based on these cases and on the case of *NLRB* v. *Dadourian Export Corporation*, 138 Fed. (2d) 891. It will be our endeavor in this brief to show that these cases do not prove the Board's point.

It will likewise be our endeavor to show that our ancillary argument, based on the provisions of the Norris-LaGuardia Act (29 U.S.C.A. 101 et seq.), has not been proven false by the Board.

The Steele and Wallace Cases Are Authority for the Proposition that the Statutory Bargaining Agent is Under the Duty of Exercising Its Powers Fairly and Impartially on Behalf of All the Employees It Represents When Dealing With An Employer in Respect to Conditions of Employment. The CIO When It Suspended the Discharged Employees and Requested and Obtained Their Dismissal Was Not Acting as Such a Statutory Bargaining Agent, Nor Was It Exercising Any Right Granted or Protected by the Wagner Act. Therefore, the Principles of the Wallace and Steele Cases Are Not Applicable Herein.

It is the contention of the Board that it was wrongful for the Petitioner to acquiesce in the discharge demands of the CIO because the conduct of CIO was wrongful. In furtherance of this contention the Board argues that when the CIO requested and obtained the dismissal of the employees it was acting in its capacity as statutory bargain-

ing representative and was under the doctrine of the *Steele* and *Wallace* cases required to exercise the powers vested in it by force of statute fairly and impartially on behalf of all employees including those who were bent upon supplanting it with another organization. The trouble with the Board's argument is that the CIO was not acting in its capacity as statutory bargaining agent when its alleged illegal acts were committed.

In the *Steele* case the Brotherhood was dealing with the employer with respect to conditions of employment when it negotiated and entered into the contract whereby the negro firemen lost their jobs, and was, therefore, acting in its capacity as statutory agent. This was likewise true of the Independent in the *Wallace* case, when it consummated the contract whereby former members of the CIO were deprived of their employment. And same can be said of the CIO when it entered into the contract here in question on July 9, 1941, with the exception that the Board concedes that this agreement was valid and without taint at its inception. (Brief for the Board, 48.)

The exception above noted marks the distinction between this and the *Steele* and *Wallace* cases. The principle of the *Steele* and *Wallace* cases is that the granted and protected right to act as exclusive representative of all employees in the unit, craft or class for the purposes of collective bargaining with an employer must be exercised fairly and impartially on behalf of all employees represented. The contracts executed by the Independent and the Brotherhood were intended to and did unreasonably discriminate against some of the employees represented and to that extent the Independent and the Brotherhood abused their statutory powers as exclusive bargaining representatives. On the other hand the agreement negotiated by the CIO was not intended to and did not exclude of any of the employees represented, and therefore the CIO fully complied with its statutory duty. The arbitrary exercise of power by the Brotherhood and the Independent rendered the contracts negoti-

ated by them void ab initio. The contract here in question did not suffer from this infirmity because the CIO fulfilled all the statutory requirements.

The distinction between the cases becomes more marked when it is noted that the Brotherhood and the Independent bargained with the employer in their capacity as statutory agents to exclude some of employees represented from employment and that the CIO did not bargain at any time as statutory agent or otherwise for the exclusion from employment of any of the employees it represented. The primary and fundamental cause of the loss of jobs in the *Steele* and *Wallace* cases were the contracts made by the Brotherhood and Independent while acting as statutory bargaining agents. In this case, however, the fundamental and primary cause of the loss of employment was not the collective bargaining agreement, nor any action taken by the CIO as exclusive bargaining agent. The primary cause of the discharges in this case was the constitution and by-laws of the CIO, and the CIO's requests therefor under the terms of the contract were not made by it as statutory agent of the employees.

The constitution and by-laws of a union are generally regarded as a contract setting forth the rights and liabilities of the members as between themselves as well as with the union. All of the Petitioner's employees, including those who were dismissed at the request of the CIO, freely chose to join the union in order to obtain employment at the Petitioner's plant, and we are entitled to assume that they accepted the constitution and by-laws of the CIO as the measure of their rights and obligations. In so accepting the constitution and by-laws of the CIO they agreed in the first instance to submit to the jurisdiction of the CIO in matters involving the right to maintain membership therein. Their loss of standing in the union does not stem from the making or the performance of the closed shop provisions of the contract, but from the contractual obligations which they undertook when they joined the CIO. The constitution and by-laws of the CIO mentioned in footnote 66, page 82 of

the Board's brief, required all those joining it to be and remain loyal members of the CIO. The CIO determined that the discharged employees violated its by-laws and constitution and for this reason declared them to be in bad standing, subject to a trial to be held at a later date to determine whether or not they were guilty of the charges made against them. After this preliminary proceeding the Petitioner was informed of their suspension and was requested to perform the conditions of the closed shop contract by removing these employees from the payroll. It seems to us, therefore, that the fundamental or basic cause of the loss of jobs was not the closed shop contract, but the contract between the discharged employees and the CIO.

The foregoing amply demonstrates that it was not a discriminatory contract between the union and the employer which was the cause of the employee's discharge, thus distinguishing this case from the *Steele* and *Wallace* cases, but a contract between the union and its members, freely entered into, and whose provisions apparently were applicable without discrimination to all members.

It also seems plain to us that in determining through its procedures that the discharged employees were in bad standing, and in requesting their discharge, the CIO was not acting in its capacity as statutory representative. For the same reason, it seems equally clear to us that in performing these acts, the CIO was not doing anything which had any connection with any of the ordinary subjects of collective bargaining, such as rates of pay, wages, hours or other conditions of employment. In so removing some of its members from good standing, and in eventually terminating their membership, the CIO, through its duly appointed representatives, was performing within its organization a quasi-judicial function, which is not granted created or protected by statute. We believe that the Board will agree that up to this point the CIO's conduct was not wrongful under the provisions of the National Labor Relations Act, and that it was not up to this point acting in its capacity as statutory bargaining agent. The Board, how-

ever, will contend that in requesting the enforcement of the closed shop contract against these employees, the CIO was acting in its representative capacity and was invoking a right granted and protected by statute, and with this we do not agree.

Under the National Labor Relations Act enforcement of a collective bargaining agreement is granted only incidentally and in connection with orders aimed at the prevention of unfair labor practices, as was the case in *N.L.R.B.* v. *Glueck Brewing Co.*, 144 F. 2d 847, where the employer refusal to perform a valid closed shop contract resulted in favoring one union over another. This Court in a recent case stated that the term unfair labor practice "is not a term of art having an independent significance which transcends its statutory definition." (*Algoma P. & V. Co.* v. *Wisconsin Emp. Rel. Bd.*, 336 U. S. 301, 305, 93 L. Ed. Ad. Ops. 541, 545.) We submit that there is nothing in the definitions of unfair labor practice contained in the act which would include a refusal to perform a collective bargaining agreement when such refusal is not incidental or connected with some unfair labor practice. It is, therefore, clear that the right to have the contract in the instant case enforced was not a right granted or protected by statute. Accordingly, when the CIO solicited and obtained the discharge, under the contract, of the employees whose membership had been suspended it was not exercising any power granted by statute, and in addition it was not bargaining with the Petitioner with respect to conditions of employment—it was merely requesting the performance of a bargain made four years before. It is, therefore, submitted that the *Steele* and *Wallace* cases are not applicable herein, and that for this reason the CIO did nothing illegal in exercising the right it has under California law of expelling and terminating the employment of members who engaged in activities antagonistic to it and who joined a rival organization. (*James* v. *Marinship Corp.*, 25 Cal. (2d) 721, 736, 155 Pac. (2d) 329, 338; *Davis* v. *International Alliance, etc. Em-*

ployees, 60 Cal. App. (2d) 713, 714-15, 141 Pac (2d) 486, 488; Rest. Torts. Comment b to Section 810.)

In addition to the cases above discussed the Board relies on the case of *National Labor Relations Board* v. *Dadourian Export Corporation*, 138 F. 2d 891 to support its contention that the CIO's conduct herein was wrongful. (Brief for the Board, 86-7.) The argument made in connection with this case is not based on the alleged arbitrary exercise of a statutory power, but on an inferred general prohibition against interference by anyone, including labor organization, with the rights guaranteed by Section 7 of the National Labor Relations Act. We submit in answer to this argument that the conclusion reached by Judge Learned Hand in the *Dadourian* case is correct but that the premise on which it is based is erroneous. Judge Hand by his decision in effect set aside an election of representatives by refusing enforcement of a Board order which would have compelled the employer to bargain with a union which the Board had certified as majority representative after the election. The facts disclosed by the opinion show that the votes necessary to insure a majority for the union had been obtained by fraud and violence on the part of the union. Judge Hand determined that these acts constituted a wrongful invasion of the rights guaranteed by Section 7 of the Act and on this ground set the election aside. We believe that if these acts of fraud and violence had been unconnected with the performance of a Board function authorized by Section 9 of the Act the conclusion reached by Judge Hand would have been erroneous. We have already shown that the Act does not protect employees from coercion, fraud or violence inflicted upon them by other employees or labor organizations (Brief for Petitioner, 45-63), but in the case under discussion what was involved was interference by a union with the performance of the Board's duties by means of fraud and violence inflicted upon employees, and such interference is expressly prohibited by the Act. Section 9 (c) of the Act casts upon

the Board the duty of making an investigation whenever a question concerning the representation of employees arises and the Board may for the purposes of this investigation take a ballot of employees, or utilize any other suitable method to ascertain their choice (29 U.S.C.A. 159(c)). Section 12 of the Act makes it a criminal offense punishable by fine and imprisonment for any person, and this term includes a union, to interfere with the Board in the performance of its duties. (29 U.S.C.A. 162.) We submit, therefore, that the conclusion and results achieved by Judge Hand can be justified because of the union's criminal action, but may not be justified, as the Board contends, on an inferred prohibition against interference by unions with the rights guaranteed to employees by Section 7 of the Act.

The Case of Virginian Ry. Co. v. System Federation No. 40, 300 U. S. 515, 81 Law Ed. 789 is Not Authority for the Proposition that the Controversy Involved Herein Is Not Within the Terms of the Norris-La Guardia Act.

The case of *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U.S. 515, 81 Law Ed. 789 has been used by the Board in an attempt to defeat the argument which we based *Lauf* v. *E. G. Shinner & Co.*, 303 U.S. 323, 82 Law. Ed. 877, and on the Norris-LaGuardia Act. (29 U.S.C.A. 101 *et seq.*) The Board relies on the following language found in the *Virginian* case:

> "It suffices to say that the Norris-LaGuardia Act can affect the present decree only so far as its provisions are found not to conflict with those of Section 2, Ninth, of the Ry. Labor Act, authorizing the relief which has been granted. Such provisions cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act." (300 U.S. 563, 81 Law. Ed. 808.)

It is apparent from the very language on which the Board relies that the subsequent enactment of the Railway Labor Act removed a dispute over an employer's refusal to bar-

gain collectively with the representative of his employees from the coverage of the Norris-LaGuardia Act, and that for this reason the provisions thereof were not an obstacle to the injunction issued by the District Court. Here, however, we have a controversy between two groups of employees which admittedly falls within the definition of a labor dispute set forth in the Norris-LaGuardia Act, and since Congress did not see fit in enacting the National Labor Relations Act to place such disputes outside of terms of the earlier statute it is apparent that the language on which the Board relies has no bearing on the present case. We, therefore, submit that under the terms of the National Labor Relations Act the Board has no right or power to interfere with or restrain the conduct of either of these groups through orders directed at the employer.

Respectfully submitted,

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